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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

KODY ALLEN WERNER,

Defendant and Appellant.

C083739

(Super. Ct. No. 16F1211)

This appeal comes to us pursuant to *People v. Wende* (1979) 25 Cal.3d 436. After reviewing the entire record, we shall order correction of the abstract of judgment but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We provide the following brief description of the factual and procedural background of the case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.)

In July 2016, defendant was charged by felony information with committing a lewd or lascivious act upon a child when the child was 15 years of age and he was at least

10 years older than that child (Pen. Code, § 288, subd. (c)(1)),¹ and annoying or molesting a child under 18 years of age (§ 647.6, subd. (a)). A jury trial commenced on November 1, 2016.

At the time of trial, the victim was 16 years old. Defendant was “probably” her favorite uncle; she was extremely close to him prior to her 15th birthday. Around one month after her 15th birthday, defendant took her out for the day as a birthday present. At this time, defendant was 27 years old. While they were playing video games at defendant’s house, he asked her if she had ever seen “boobs” or a penis. After the victim indicated that she had seen both but had only seen a penis in pictures, they stopped talking and went back to playing video games.

Later, they went out to pick up a pizza and some drinks at a coffee shop. When they returned to defendant’s house, they watched a movie while eating the pizza and having their drinks. After the movie, they started to wrestle. Although they had wrestled in the past, this time was different because defendant got on top of her and pinned her down for a long time. The victim had a “gut feeling” that defendant’s behavior was “not okay” and something was wrong but she did not leave or ask to leave when he finally got off of her. Defendant then went to the bathroom and left the door open, which the victim considered a “red flag” because she could see into the bathroom from where she was sitting.

When defendant returned from the bathroom, he asked the victim if he could touch her “boobs.” The victim “was shocked, and surprised, and scared,” by defendant’s request. Following a discussion in which defendant told the victim she had a beautiful body and that he would get into trouble and his life would be ruined if she told anyone about his behavior, the victim complied with defendant’s request to turn around. He then

¹ Undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

took off her shirt and bra and touched her breasts for about five minutes. Defendant stopped after the victim told him to do so twice and said she wanted to go home.

Prior to taking the victim home, defendant unbuckled his belt and offered to show his penis to her. When the victim indicated she was not interested, defendant unzipped his pants and asked her if she was sure. The victim indicated that she was sure and said she wanted to go home.

On the drive to the victim's house, defendant said, "Thank you. I really needed that," and then kissed her hand. As defendant was dropping the victim off, he told her that he loved her.

After "crying really hard" and taking a shower, the victim called her best friend and told her what had happened. Eventually, the victim also told her mother what defendant had done to her.² When the victim's mother confronted defendant, he did not expressly deny the victim's allegations.

Defendant testified on his own behalf. He denied touching the victim's breasts or asking to touch them. He also denied asking the victim if she had ever seen boobs or a penis, and claimed that he did not have a sexual interest in the victim. He admitted that he did not expressly deny the victim's allegations when he was confronted by the victim's mother or during his police interview.

The jury found defendant guilty of the charged offenses. The trial court sentenced him to one year four months in prison on the lewd or lascivious act count and to a time

² In addition to the August 2015 incident, the victim also testified about a video she made of herself in late 2014 using her mother's computer. She explained that she was not wearing any clothes in the video, and that she deleted the video immediately after she made it. She further explained that, during a Christmas party in 2014, defendant told her that he had found the video while he was trying to fix her mother's computer. He said that he watched the video and then deleted it. He assured her that he would not say anything about the video. When defendant testified, he admitted that he found the video but claimed he only saw the first image and then deleted it.

served sentence on the annoying or molesting a child count. The trial court ordered him to pay various fines and fees and indicated it would issue a 10-year criminal protective order. Defendant was also ordered to register as a sex offender. Defendant did not object to any of the fines and fees imposed by the trial court.

Defendant filed a timely notice of appeal. Thereafter, the trial court vacated defendant's sentence on the lewd or lascivious act count and resentenced him to one year in prison.

WENDE REVIEW

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts and procedural history of the case and requests this court to review the record and determine whether there are any arguable issues on appeal.

(*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days from the date the opening brief was filed. More than 30 days have elapsed and defendant has not filed a supplemental brief. Having undertaken an examination of the entire record pursuant to *Wende*, we find no arguable error that would result in a disposition more favorable to defendant. However, we have found errors in the abstract of judgment that must be corrected.

At sentencing, the trial court imposed a \$30 administrative fee (calculated as 10 percent of the \$300 restitution fine (§ 1202.4, subds. (b), (l)), a \$151 booking fee (Gov. Code, § 29550.2, subd. (a)), and a \$250 presentence investigation fee (§ 1203.1b). The abstract of judgment, however, does not reflect the imposition of these fees. Where the abstract of judgment differs from the court's oral pronouncement, the oral pronouncement of judgment controls. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070.) Such errors in the abstract of judgment may be corrected by this court on appeal. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, we direct the trial court to correct the abstract of judgment to reflect the fees orally imposed at sentencing.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment reflecting a \$30 administrative fee (§ 1202.4, subds. (b), (*l*)), a \$151 booking fee (Gov. Code, § 29550.2, subd. (a)), and a \$250 presentence investigation fee (§ 1203.1b). The clerk shall forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

s/MURRAY, Acting P. J.

We concur:

s/DUARTE, J.

s/HOCH, J.